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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 146

CLIFTON MANUFACTURING COMPANY, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court of the United States for the Western District of South Carolina (R. 50–69) is reported in 3 F. Supp. 508. The opinion of the Circuit Court of Appeals (R. 120–122) is reported in 70 F. (2d) 102.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 4, 1934 (R. 122). A petition for a writ of certiorari was filed July 3, 1934, and the writ was granted October 8, 1934. The juris-

diction of this Court rests upon Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a tax return filed under the Revenue Act of 1917 prior to the enactment of the Revenue Act of 1918 started the running of the period of limitations prescribed by the Revenue Act of 1918.

2. Whether the collection of the tax was authorized by timely and valid waivers.

STATUTES AND OTHER AUTHORITIES INVOLVED

These are set forth in Appendix A, *infra*, pp. 26–31.

STATEMENT

This suit was instituted in the District Court of the United States for the Western District of South Carolina to recover income and profits taxes for the fiscal year ending March 31, 1918, in the sum of $162,805.61 and interest (R. 50). At the trial it was conceded that there was a good defense as to part of the claim by reason of the filing of a claim in abatement and the application of Section 611 of the Revenue Act of 1928 (R. 53). As a result petitioner's claim was reduced to $57,265.76 with interest (R. 50).

The case was tried before the court without the intervention of a jury (R. 71), and the District Court filed an opinion containing findings of fact and conclusions of law (R. 50–69). From these findings the following pertinent facts appear:

Petitioner is a corporation. For the fiscal year April 1, 1917, to March 31, 1918, it filed a return on May 28, 1918, under the Revenue Act of 1917, disclosing a tax liability of $171,002.96. After the passage of the Revenue Act of 1918, and on April 29, 1919, petitioner filed another return for the same period disclosing a tax liability of $50,638.75 in excess of that shown on the first return. These taxes were paid and in June 1919 an additional assessment was made for the said fiscal year which was paid on June 16, 1919. An additional assessment was made in May 1921, which was paid. On May 26, 1926, a letter setting forth a deficiency of $37,313.46 was mailed to petitioner. No appeal was taken to the Board of Tax Appeals and the tax was assessed, with interest, on September 4, 1926, and paid on October 15, 1926 (R. 52).

On June 25, 1923, a waiver was executed by petitioner's president and treasurer extending the time for the assessment and collection of 1918 taxes for one year (R. 54–55). Thereafter other waivers were executed, on January 19, 1924 (R. 26), December 4, 1924 (R. 28–29), and November 18, 1925 (R. 30, 73). The District Court found as a fact that there was no such misrepresentation, mutual mistake, or lack of authority as to invalidate the waivers, even if signed after the expiration of the statutory period (R. 55).

The judgment of the District Court for the United States was affirmed by the Circuit Court

of Appeals upon the ground that the period of limitations began to run from the filing of the second return (R. 120–122).

SUMMARY OF ARGUMENT

1. The return of May 28, 1918, was required by the Revenue Act of 1917 and it was filed in response thereto. The Revenue Act of 1918 required every corporation to file a return and that requirement was not satisfied by the return already filed. Not until the return of April 29, 1919, was filed did petitioner attempt to comply with the statutory requirement. Since Congress adopted the date when the return was filed as the beginning of the statutory period of limitations, we submit that the time did not begin to run in this case until April 29, 1919. In the Revenue Act of 1918 there were many changes of a basic and fundamental character, in addition to an increase in the rates. These changes would normally require a new return and it would be only a fortuitous circumstance if the return filed under the Revenue Act of 1917 should prove to have reported the same tax liability that was later incurred under the Revenue Act of 1918. The Treasury Decision requiring additional returns where the taxpayer was subject to an additional tax must be read in the light of the authority of the administrative officers who issued it. They have no power to waive substantial rights of the United States. Moreover, the Treasury Decision makes no repre-

sentation with respect to the period of limitations and it should not be construed to reduce the time which Congress intended the Commissioner to have for auditing the returns and assessing and collecting the tax. The construction which has been put upon the Treasury Decision by some courts is unsound and achieves a result which is contrary to the express terms of the statute. Furthermore, the new statute had a substantial effect upon the petitioner's tax liability. Petitioner filed a return in response to the requirements of the Revenue Act of 1918 and hence we submit that the return of April 29, 1919, marked the time when the limitation period commenced to run.

2. The decision below may be sustained upon the independent ground that petitioner executed a series of waivers which prevented the running of the limitations period. It is now well settled that waivers are valid even though executed after the expiration of the statutory period. The District Court found as a fact that there was no such misrepresentation, mutual mistake, or lack of authority in connection with the execution of the waivers as to invalidate them. The case presents no unusual circumstances; no element of coercion or duress is involved; and we submit that the waivers constitute a valid defense to this action.

ARGUMENT

I

THE STATUTE OF LIMITATIONS COMMENCED TO RUN ON APRIL 29, 1919, WHEN A RETURN WAS FILED IN RESPONSE TO THE REQUIREMENTS OF THE REVENUE ACT OF 1918

This is a suit against the United States in which a tax is sought to be recovered upon the ground that the collection was not timely. The petition for certiorari presents the single question whether the statute of limitations upon the assessment and collection of additional income and excess profits taxes for the fiscal year ending March 31, 1918, began to run on May 28, 1918, or upon April 29, 1919, the dates upon which petitioner filed two separate returns.

The Revenue Act of 1918 did not become a law until February 24, 1919. Consequently, the return of May 28, 1918 (R. 85), was filed while the Revenue Act of 1917 was in effect. That return was required by the 1917 Act and was filed in response to it. The Revenue Act of 1918 provided that fiscal years ending in the calendar year 1918 should be taxed partly at the rates imposed by the Revenue Act of 1917 and partly at the rates imposed by the Revenue Act of 1918. Sections 205 (a) and 335 (a), *infra,* pp. 26, 27. These sections deal with the taxes "imposed for such fiscal year by this title", and hence it is clear that the Revenue Act of 1918 is to be regarded as the statute which imposed the tax in this case.

In clear and simple language which needs no construction the Revenue Act of 1918 required that returns be filed covering such fiscal years.

Section 239, dealing with the income tax, provided:

> That every corporation subject to taxation under this title and every personal service corporation shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this title. * * *

Section 336, dealing with the excess profits tax, provided:

> That every corporation, not exempt under section 304, shall make a return for the purposes of this title.

Section 250 (b) required that—

> As soon as practicable after the return is filed, the Commissioner shall examine it.

Section 250 (d)[1] provided that—

> * * * the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made * * *.

---

[1] The statute of limitations applicable to this case had its origin in this section. In all the later Acts the date when the return was filed has continued to be the starting point of the statutory period.

Section 250 (d), Revenue Act of 1921, c. 136, 42 Stat. 227; Section 277 (a) (2), Revenue Act of 1924, c. 234, 43 Stat. 253 (U. S. C., Title 26, Sec. 1057); Section 277 (a) (3), Revenue Act of 1926, c. 27, 44 Stat. 9 (U. S. C. App., Title 26, Sec. 1057).

Pursuant to these requirements petitioner filed another return, on April 29, 1919, for its fiscal year ending March 31, 1918 (R. 52, 72, 85–89). This return disclosed that the tax as computed under the Revenue Act of 1918 was $50,638.75 in excess of the tax as computed under the Revenue Act of 1917 (R. 88). If this was the return from which the statute of limitations prescribed by Section 250 (d) began to run, it is conceded that the collection was timely.

The express terms of the Revenue Act of 1918 clearly required petitioner to file this second return. But had the statute been less explicit, there are cogent reasons which would irresistibly lead to the conclusion that Congress must have intended that a return be filed, even by those corporations which had already filed a return under the Revenue Act of 1917. A comparison of the two statutes shows conclusively that many changes were made in the new Act which would make inadequate many returns filed under the Revenue Act of 1917.

Not only were the rates increased (compare Sec. 1206, Revenue Act of 1917, c. 63, 40 Stat. 300, with Sec. 230 (a), Revenue Act of 1918; Sec. 201, Revenue Act of 1917, with Sec. 301, Revenue Act of 1918), but many changes were made of a basic and fundamental character upon which the computation of the tax depended (see H. Rept. No. 767, 65th Cong., 2nd Sess.; S. Rep. No. 617, 65th Cong., 3rd Sess.). Section 212, Revenue Act of 1918, for the first time required that income tax returns be made

upon the basis of the taxpayer's fiscal year (*National Shirt Shops* v. *United States*, 57 F. (2d) 925, 928 (C. Cls.), certiorari denied, 287 U. S. 633. Accordingly, any taxpayer who kept his books on a fiscal-year basis but had made a return under the Revenue Act of 1917 upon a calendar-year basis was required to file a return which corresponded with his books.

Section 212 (b), Revenue Act of 1918, required that the net income be computed "in accordance with the method of accounting regularly employed in keeping the books of such taxpayer." This was a departure from previous practice, for under earlier Acts the taxpayer might keep its books upon the accrual basis and file its tax return upon the cash basis. See Section 8 (g), Revenue Act of 1916, c. 463, 39 Stat. 756; *Appeal of Charles A. Collin*, 1 B. T. A. 305, 311.

Section 240 of the Revenue Act of 1918 required that corporations which were affiliated should file consolidated returns. The Revenue Act of 1917 required affiliated corporations to make separate income tax returns. (See Articles 203 and 207, Regulations 33, Revised.) The Regulations dealing with the excess-profits tax under the Revenue Act of 1917 permitted affiliated corporations to file consolidated returns with respect thereto. Articles 77–78, Regulations 41. See S. Rep. No. 275, 67th Cong., 1st Sess., p. 34.

These changes were applicable alike to all corporate taxpayers, and since Congress provided that

every corporation subject to taxation under the new Act should make a return, there seems to be little room for the contention that only those corporations whose tax was increased by reason of the change were required to make returns. It is immaterial whether the Commissioner might have secured all needed information from the return which had already been filed, for, in any event, the Commissioner could not be assured of that until the taxpayer applied the new provisions of the statute to itself and reported that they made no change in its situation. Under the statute the Commissioner is entitled to the information from the taxpayer before the statute of limitations begins to run and all taxpayers were under the duty to file a return under the 1918 Act, wholly aside from the possibility that the Commissioner could secure sufficient information elsewhere. In *Florsheim Bros. Co.* v. *United States*, 280 U. S. 453, this Court answered the argument that a tentatitve return was sufficient to start the limitation period running in this language (pp. 463–464):

> The Commissioner is not confined to the taxpayer's return for the basis of his assessment. He may secure additional information; and he may assess the tax even if the taxpayer files no return. Rev. Stat., Sec. 3176, U. S. C., Tit. 26, Sec. 97; Revenue Act 1918, Sec. 250 (c). The mere fact that, in the absence of any information, the Commissioner might be compelled to assess the tax on the basis of the taxpayer's estimate, does

> not transform that simple estimate of the amount of the tax into the detailed return of the items of gross income, deductions, and credits required by the Act.

However, by Treasury Decision 2797, *infra*, p. 30, it was announced that if a corporation is subject to additional tax under the Revenue Act of 1918 a return must be filed. This decision, and similar ones under other Acts, have been construed either as relieving from the requirement those corporations whose tax was not increased, or as regarding the new return, in those cases where it was filed, as simply amendatory of the return previously filed. *Myles Salt Co.* v. *Commissioner,* 49 F. (2d) 232 (C. C. A. 5th); *Isaac Goldmann Co.* v. *Burnet,* 51 F. (2d) 427 (App. D. C.); *Valentine-Clark Co.* v. *Commissioner,* 52 F. (2d) 346 (C. C. A. 8th).

The consequence of such a construction requires its rejection. The result would be that notwithstanding Congress required every corporation to submit a return and prescribed a five-year limitation period to commence at the time the return was filed, nevertheless the five-year period was shortened by nine months because petitioner had filed a return under the Revenue Act of 1917 before the passage of the Revenue Act of 1918.

We submit that the Treasury Decision must be read in the light of the power of the administrative officers who issued it. No officer of the United States has authority to substitute something else for the thing specified by the provisions of an Act

of Congress (*Lucas* v. *Pilliod Lumber Co.,* 281 U. S. 245, 249); nor to waive substantial rights of of the United States (*Finn* v. *United States,* 123 U. S. 227). Such waivers, if permitted, would defeat the only purpose of the statute and impose a liability upon the United States which otherwise would not exist. *Tucker* v. *Alexander,* 275 U. S. 228. In *Davis* v. *United States,* 17 C. Cls. 292, where a claim for allowance of a drawback for internal taxes paid on exports was under consideration, it was said (p. 301):

> When a government declares by law that certain specified acts must be done, in order to a citizen's becoming entitled to a gratuity out of the public Treasury, to which, aside from that law, he would have no right, every one of the acts must be done before he can claim the gratuity.
>
> And when a time is limited within which any of the acts shall be done, the very fact that it is limited is a declaration by the government of its materiality, and constitutes a condition precedent, which must be fulfilled before the right to the gratuity can be fixed. No claimant can say that it does not matter whether he did the act within the required time; for he has no standing as a claimant before the Commissioner unless it was done within that time; nor can any officer of the government, or any court, dispense with the requirement of time, unless express law so authorize; * * *.

Reading the Treasury Decision in the light of these principles, we submit that at most it authorized corporations to determine at their peril whether or not they were subject to additional taxes and to omit filing a new return only where it would be an idle formality. It certainly did not represent that the date of filing the 1917 return would be treated as the beginning of the limitation period. Cf. *Florsheim* case, *supra*, p. 464, where there was a similar holding with respect to the Treasury's permission to file tentative returns. To attribute any broader effect to the Treasury Decision—to hold it recognized a return already filed as satisfying the provisions of the new statute—would, we submit, require the conclusion that the administrative officers had exceeded their authority and had announced a rule in conflict with the express terms of the statute.

Zellerbach Paper Co. v. *Helvering*, 69 F. (2d) 852 (C. C. A. 9th), dealt with a similar situation. That court declined to follow the *Myles Salt*, *Goldmann*, and *Valentine-Clark* cases, *supra*, and said (p. 857) :

> We think the really serious question involved in the matter of returns under the new act for the taxable year 1921 is not whether the Commissioner had a right to require a new return under the Revenue Act of 1921, the act itself required it, or whether he intended to do so, as he clearly did in the case at bar, but whether he had a right to

> excuse taxpayers from making a return under that law as he attempted to do where the statute expressly required such a return, that is, where there was no increase of tax. That question, however, is not involved here and we need not consider it.

See also *National Paper Products Co.* v. *Helvering,* 69 F. (2d) 857 (C. C. A. 9th).[2]

The only effect of the new statute upon the taxpayers involved in the *Myles Salt, Goldmann,* and *Valentine-Clark* cases, *supra,* was a reduction in the amount of the statutory credit resulting in increased taxes of small amounts. Those decisions were influenced by the fact that the effect of the new statute upon the particular taxpayers before the court was negligible. We submit that such a theory is unsound. No support for it can be found in the statute and there is no reasoning or logic to commend it. If the rule is that every corporation is required to file a return, there are no difficulties. If the rule is to be that every corporation which is liable for an additional tax is required to file a return, there should be no distinction between large amounts of tax and smaller amounts. But even upon that basis such a rule is objectionable. The decision in the *Goldmann* case, *supra,* pp. 427–428, recognizes that the result may be different "in

[2] The *Zellerbach* and *National Paper Products* cases, *supra,* are now pending in this Court upon writs of certiorari (Nos. 35–39, present term) and are to be heard at the same time as the instant case.

those cases which, under the 1921 act, new and different taxes are assessed or a new basis of taxation provided, as is the case in some few instances not here involved." A small additional tax was due under the new Act in that case and the court evidently meant that a larger tax liability would present a different situation. In other words, that court would say that the accuracy with which the taxpayer applies the new statute is determinative of the question whether a new return is required. In those cases where the taxpayers correctly decide that the new statute creates only a nominal liability, no returns are required; in those cases where the taxpayers' decisions turn out to be erroneous because the new statute requires larger taxes, they have failed to comply with the statute. We submit that such a rule is unsound.

The statute applies alike to all corporations and requires them all to file returns. This requirement is not contingent upon their being liable for a tax. Under all the Revenue Acts corporations are required to file returns whether or not they have to pay a tax. The returns are required to include a computation of the tax and in the case of the first installment provided for in Section 250 (a) of the Revenue Act of 1918 the instructions printed on the return operate as a demand and a notice of the amount which is due. See Section 250 (e), Revenue Act of 1918. The return which was filed May 28, 1918, in advance of the enactment of the

Revenue Act of 1918, did not purport to satisfy these requirements of the 1918 Act. It was filed under the Revenue Act of 1917 and in compliance with its provisions. No statute of limitations was then applicable and we submit that a return filed in response to the requirements of the Revenue Act of 1917 could not start the statute of limitations prescribed by Section 250 of the Revenue Act of 1918.

However, even if the rule announced in the *Goldmann* case be correct, and only those taxpayers who are required to pay a substantial additional tax were required to file returns under the Revenue Act of 1918, it is apparent that this rule does not strengthen petitioners' position, because the effect of the new statute in the case at bar was to require an additional tax of $50,638.75. Petitioner actually filed a return after the enactment of the Revenue Act of 1918, showing this additional tax to be due, and we submit that this return, filed on April 29, 1919, marked the beginning of the statutory period for collection.

Section 250 (d) of the Revenue Act of 1918 limited the time for collection to five years after the return was due or was made. Unless the return filed April 29, 1919, marked the beginning of this period, it is quite evident that part of the five years had already elapsed when the statute was written and that the period which Congress concluded to allow the Commissioner for examination of the re-

turns and the computation, assessment, and collection of the tax commenced to run before the Commissioner was in a position to know what the statute required or the taxpayer had disclosed how the new requirements affected it. This result is not required by the statute and the rule of construction that doubtful taxing statutes are to be construed favorably for the taxpayer is not a reason for creating the doubt or exaggerating it. *Irwin* v. *Gavit,* 268 U. S. 161. Ordinarily, statutes of limitations are not construed to commence to run against a right until the right is capable of enforcement. *Borer* v. *Chapman,* 119 U. S. 587, 602. This tax could not have been collected before the enactment of the Revenue Act of 1918, and we submit that the statute of limitations did not start in advance of its enactment.

The fact that the Revenue Act of 1918 was in terms retroactive to January 1, 1918, does not compel the conclusion that any return filed subsequent to that date was intended to be recognized as a return which would satisfy the requirements of the statute. All taxpayers were under obligation to file returns during the year 1918, accounting for their 1917 income. The return which petitioner filed on May 28, 1918, was no different in this respect from the return of any other taxpayer. All purported to be filed in compliance with the requirements of the Revenue Act of 1917, and only under fortuitous circumstances would they report

the same tax liability as was later incurred under the Revenue Act of 1918. The purpose to be served by making the statute retroactive was to apply the new rates to income earned during the whole calendar year 1918. There is no evidence of an additional purpose to require the assessment and collection of taxes due under the Revenue Act of 1918 within a shorter period than five years in the case of taxpayers reporting on a fiscal-year basis.

We submit that the return of May 28, 1918, was not a return under the Revenue Act of 1918 because it was not intended to be such a return and was not offered as such. The term " return " comprehends a formal response to a statutory requirement. In deciding that a tentative return filed under the Revenue Act of 1918 did not start the running of the statute of limitations period, this Court declared in the *Florsheim* case, *supra,* p. 462, that—

> The word " return " is not a technical word of art. It may be true that the filing of a return which is defective or incomplete under Section 239 is sufficient to start the running of the period of limitation; and that the filing of an amended return does not toll the period. But the defective or incomplete return purports to be a specific statement of the items of income, deductions and credits in compliance with Section 239. And, to have that effect, it must honestly and reasonably be intended as such.

So strict is the rule that a statute of limitations runs against the United States only when it as-

sents, and upon the terms it prescribes, and that meticulous compliance with all named conditions is necessary to secure the benefit of such a limitation, that this Court held in the *Pilliod Lumber* case, *supra,* that the mere omission of the oath of the prescribed corporate officers prevented the running of the statutory period of limitations. In that case a tentative return was filed which was sworn to by the president and treasurer of the corporation. The oaths, however, were omitted from the form upon which the completed return was filed and although an attempt was made to cure the defect later by a separate sworn statement, this Court held that the collection of a deficiency six years after the filing of the completed return was not barred. In that case there was no failure upon the part of the taxpayer to supply all the required information and there was no failure to file a form which purported to be a return in response to the requirements of the taxing statute. The only omission was the oath.

Unlike that case, there was here no attempt to satisfy the requirements of the Revenue Act of 1918 by the return filed on May 28, 1918. That return did not purport to be a compliance with the Revenue Act of 1918 and it did not disclose how the Revenue Act of 1918 affected the petitioner's tax liability. It was not until the return of April 29. 1919, was filed that petitioner made any attempt to satisfy the requirements of the Revenue Act of 1918; it was not until that return was filed that the petitioner discharged its duty and complied with

the named conditions upon which the running of the statute of limitations depends. Hence, we submit that the statute of limitations did not begin to run earlier than April 29, 1919, and that the collection of the tax was not barred.

This Court is not called upon to go so far in affirming the decision below as it did in the *Pilliod* case, and there is greater justification here. In the *Pilliod* case the sole practical effect of the omission of the oath was to prevent the prosecution of the officers for offenses growing out of false statements. The effect here of holding that the statute of limitations commenced to run before the Revenue Act of 1918 was enacted will be to reduce the time available to the Commissioner for assessing and collecting the tax from five years (which the statute provides) to four years and three months.

Additional authorities pertinent to this question are cited in the brief for the respondent in *Zellerbach Paper Co.* v. *Helvering* and *National Paper Products Co.* v. *Helvering,* Nos. 37, 38, 39, present term, and we request that they be considered as incorporated herein by reference.

II

THE COLLECTION OF THE TAX WAS AUTHORIZED BY TIMELY AND VALID WAIVERS

The decision below may be supported upon the independent ground that on June 25, 1923, petitioner executed the first of a series of waivers which prevented the running of the statute of limi-

tations. If, as hereinbefore contended, the five-year period of limitations commenced to run from the filing of the return of April 29, 1919, the initial waiver of June 25, 1923, was given well within the period and there is a complete chain of waivers covering the date of collection. However, if the limitation period commenced to run upon the filing of the return of May 28, 1918, the initial waiver was given more than five years thereafter.

Petitioner's contention that the waivers are invalid by reason of fraudulent misrepresentation, mutual mistake, or lack of authority of petitioner's president and treasurer to execute it, is entirely predicated upon the claim that the statutory period of limitations had expired (R. 66).

Assuming petitioner's premise to be correct, it is now settled that waivers given after the expiration of the period of limitations are valid. *Stange* v. *United States,* 282 U. S. 270; *Burnet* v. *Railway Equipment Co.,* 282 U. S. 295; *Brown & Sons Co.* v. *Burnet,* 282 U. S. 283; *McDonnell* v. *United States,* 288 U. S. 420; *Helvering* v. *Newport Co.,* 291 U. S. 485. Therefore the waivers were timely.

Accordingly the only remaining inquiry is whether there was any fraudulent misrepresentation, mutual mistake, or lack of authority in petitioner's officers in executing the waivers which would invalidate them. The District Court found that there was none (R. 55), and we submit that that finding is supported by the evidence. The claimed misrepresentation consists of a letter dated June

21, 1923 (R. 53), in which the Commissioner requested petitioner to execute a waiver "in order that the interests of the Government may not be jeopardized." Relying upon its contention that the statute of limitations had then expired, petitioner claims that this letter was a fraudulent misrepresentation that the limitation period had not expired. Similar contentions are made in connection with the letters requesting the subsequent waivers (R. 25–6, 27). In *Fleitmann* v. *Burnet,* 65 F. (2d) 178 (App. D. C.), certiorari denied, 290 U. S. 638, and *Helvering* v. *South Penn Oil Co.,* 68 F. (2d) 420 (App. D. C.), similar contentions were rejected. The same situation existed in the *Railway Equipment* case, *supra.* See note 11, p. 303.

Petitioner's contention that the waivers are invalid by reason of mutual mistake and lack of authority in petitioner's officers is likewise predicated upon the premise that the statute of limitations had expired at the time the initial waiver was executed. A similar defense was rejected in *Piedmont Wagon & Mfg. Co.* v. *United States,* 6 F. Supp. 125 (C. Cls.), where the court said (p. 129):

> The waivers in question were sent to plaintiff by the Commissioner in the usual way with request that they be executed and returned. This was done without protest of any kind.

There were no unusual circumstances existing in the case at bar. Assuming that the statute of limitations had then expired, petitioner's president did

not know it and the Government representatives who negotiated for the waivers were then under the impression that the time had not expired (R. 66–67). The situation presented is no different from many other cases, and as pointed out by this Court in the *Stange* case, *supra,* p. 277, the action of the parties "is explained by the belief prevailing prior to the decision in *Bowers* v. *N. Y. & Albany Lighterage Company,* 273 U. S. 346, that distraint, the common method for coercing payment, was possible even when the statutory period for collection by suit had expired." Any mistake existing in this case was one of law, not induced by misrepresentation, coercion, or duress of any kind, and we submit that there is no element here involved which should distinguish this case from the *Stange, Railway Equipment Co., McDonnell, Brown & Sons Co.,* and *Newport Co.* cases, *supra.*

In the *Railway Equipment* case, *supra,* this Court said (p. 303):

> The taxpayer contends that the waiver was inoperative because secured by duress. The argument is that while the Commissioner in December 1925, might have made a jeopardy assessment and have enforced collection, such action would have been illegal because the statutory period had then expired, and that a waiver procured by such a threat is ineffective. Whether or not the Commissioner would have been liable to the taxpayer for a collection made as the result of a jeopardy assessment in 1925, we need not deter-

> mine. He clearly had the power to make such assessment and thereby compel the filing of a claim for abatement and the giving of a bond, or, if such claim and accompanying bond were not filed, to make collection and relegate respondent to an action at law. In the absence of a determination that this deficiency was barred, it was the Commissioner's duty to proceed to insure the assessment and collection of the tax. At his suggestion, the taxpayer executed the waiver. Thereby it was enabled to have all questions concerning the alleged deficiency considered by the Board. A waiver given under such circumstances is not invalid. This contention, which seems to have been raised for the first time in this Court, is also unsound.

Accordingly we submit that petitioner's officers were not merely waiving petitioner's rights; they were also securing the benefit of postponing the action of the Collector. In this view of the case we submit that petitioner's objections to the waivers are insufficient.

The decision in *Panther Rubber Mfg. Co.* v. *Commissioner,* 45 F. (2d) 314 (C. C. A. 1st), upon which petitioner strongly relies, was rendered before the decision in the *Stange case, supra,* and the court was plainly influenced by its view that the waivers were not timely. Where the court understood that so far as timeliness was concerned the waivers were valid, we find no decision which holds that such negotiations as existed here invalidate the waivers.

Cf. *United States* v. *Southern Lumber Co.*, 51 F. (2d) 956 (C. C. A. 8th), certiorari denied, 284 U. S. 680. The distinction which was made in *Hammond* v. *Carthage Sulphite Pulp & Paper Co.*, 34 F. (2d) 155 (N. D. N. Y.), and *South Penn Oil Co.* v. *Commissioner*, 20 B. T. A. 1180, between extending an open limitation period and extending a period which had expired, does not exist.

CONCLUSION

In view of the foregoing, it is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

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Solicitor General.
WILLIAM STANLEY,
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FRANK J. WIDEMAN,
Assistant Attorney General.
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OCTOBER 1934.

APPENDIX

STATUTES AND OTHER AUTHORITIES INVOLVED

Revenue Act of 1918, c. 18, 40 Stat. 1057:

> SEC. 205. (a) That if a taxpayer makes return for a fiscal year beginning in 1917 and ending in 1918, his tax under this title for the first taxable year shall be the sum of: (1) the same proportion of a tax for the entire period computed under Title I of the Revenue Act of 1916 as amended by the Revenue Act of 1917 and under Title I of the Revenue Act of 1917, which the portion of such period falling within the calendar year 1917 is of the entire period, and (2) the same proportion of a tax for the entire period computed under this title at the rates for the calendar year 1918 which the portion of such period falling within the calendar year 1918 is of the entire period: *Provided*, That in the case of a personal service corporation the amount to be paid shall be only that specified in clause (1).
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> * * * * *
>
> SEC. 250. (d) Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made. In the case of such false or

fraudulent returns, the amount of tax due may be determined at any time after the return is filed, and the tax may be collected at any time after it becomes due.

(e) If any tax remains unpaid after the date when it is due, and for ten days after notice and demand by the collector, then, except in the case of estates of insane, deceased, or insolvent persons, there shall be added as part of the tax the sum of 5 per centum on the amount due but unpaid, plus interest at the rate of 1 per centum per month upon such amount from the time it became due: *Provided*, That as to any such amount which is the subject of a bona fide claim for abatement such sum of 5 per centum shall not be added and the interest from the time the amount was due until the claim is decided shall be at the rate of ½ of 1 per centum per month.

In the case of the first installment provided for in subdivision (a) the instructions printed on the return shall be deemed sufficient notice of the date when the tax is due and sufficient demand, and the taxpayer's computation of the tax on the return shall be deemed sufficient notice of the amount due.

* * * * *

SEC. 335. (a) That if a corporation (other than a personal service corporation) makes return for a fiscal year beginning in 1917 and ending in 1918, the tax for the first taxable year under this title shall be the sum of: (1) the same proportion of a tax for the entire period computed under Title II of the Revenue Act of 1917 which the portion of such period falling within the calendar year 1917 is of the entire period, and (2) the same proportion of a tax for the entire period computed under this title at the rates

specified in subdivision (a) of section 301 which the portion of such period falling within the calendar year 1918 is of the entire period. Any amount heretofore or hereafter paid on account of the tax imposed for such fiscal year by Title II of the Revenue Act of 1917 shall be credited toward the payment of the tax imposed for such fiscal year by this title, and if the amount so paid exceeds the amount of the tax imposed by this title, the excess shall be credited or refunded to the corporation in accordance with the provisions of section 252.

* * * * *

SEC. 336. That every corporation, not exempt under section 304, shall make a return for the purposes of this title. Such returns shall be made, and the taxes imposed by this title shall be paid, at the same times and places, in the same manner, and subject to the same conditions, as is provided in the case of returns and payment of income tax by corporations for the purposes of Title II, and all the provisions of that title not inapplicable, including penalties, are hereby made applicable to the taxes imposed by this title.

Treasury Regulations 33 (revised), governing the collection of the income tax imposed by the Act of September 8, 1916, as amended by the Act of October 3, 1917:

ART. 203. *When required.*—Every corporation not specifically enumerated as exempt shall make a return of annual net income whether or not it may have for the particular year any net income, or whether or not it shall be a subsidiary of or controlled by another corporation, and such return, if made on the basis of a calendar year, must

be filed with the collector on or before March 1, next following the year for which the return is made; if on the basis of a fiscal year ending with a date other than December 31, it must be filed within 60 days after the close of such fiscal year.

* * * * *

ART. 207. *Branch corporations.*—For the purpose of the tax and for the purpose of a return, every corporation is held to be and is a separate and distinct entity. The fact that a branch corporation is organized in any State to meet peculiar conditions there existing and which make it impracticable for the parent company as such to do business in such State, although such subsidiary may be to all intents and purposes a mere branch of the parent company, does not relieve it from the necessity of making a return for each year.

If such branch corporation actually transacts business from which income arises, accrues, and is received by it, it will be incumbent upon such corporation to make a detailed return, as if it were in no way related to any other corporation, setting forth in such return the full amount of income which it receives or which accrues to it, together with the authorized deductions therefrom, and upon any net income thus disclosed the tax will be assessed and required to be paid.

Treasury Regulations 41, relative to the war excess profits tax imposed by the War Revenue Act, approved October 3, 1917:

ART. 77. *When affiliated corporations must furnish information as to intercorporate relations.*—For the purpose of the excess profits tax every corporation will describe in its return all its intercorporate relationships

with other corporations with which it is affiliated, and will furnish such information in relation thereto as will enable the Commissioner of Internal Revenue to compute the amount of the tax properly due from each corporation on the basis of an equitable and lawful accounting.

* * * * *

ART. 78. *When affiliated corporations may be required to make consolidated return.*— Whenever necessary to more equitably determine the invested capital or taxable income, the Commissioner of Internal Revenue may require corporations classed as affiliated under article 77 to furnish a consolidated return of net income and invested capital. Where such consolidated return is required it may be made by any one or more of such corporations or by all of them acting jointly; but if such affiliated corporations, when requested to file such consolidated return, neglect or refuse to do so, the Commissioner of Internal Revenue may cause an examination of the books of all such corporations to be made and a consolidated statement to be made from such examination. In cases where consolidated returns are accepted, the total tax will be computed in the first instance as a unit upon the basis of the consolidated return and will be assessed upon the respective affiliated corporations in such proportions as may be agreed among them. If no such agreement is made the tax will be assessed upon each such corporation in accordance with the net income and invested capital properly assignable to it.

Treasury Decision 2797 approved March 11, 1919):

To internal-revenue officers and others concerned:

If a corporation has before February 25, 1919, filed a return for a fiscal year ending in 1918 and paid or become liable for a tax computed under the revenue act of 1917, and is subject to additional tax for the same period under the revenue act of 1918, the return covering such additional tax shall be filed at the same time as returns of persons making returns for the calendar year 1918 are due under existing rulings, and payment of such additional tax is due in the same installments and at the same times as in the case of payments based on returns for the calendar year 1918. If no part of the tax for such fiscal year was due until after February 24, 1919, the whole amount of tax due, including tax due under the original return and additional tax due under the amended return, will be payable in the same installments and at the same times as in the case of payments based on returns for the calendar year 1918.

U. S. GOVERNMENT PRINTING OFFICE: 1934

SUPREME COURT OF THE UNITED STATES.

No. 146.—October Term, 1934.

Clifton Manufacturing Company Petitioner, *vs.* United States of America, Respondent.	On Writ of Certiorari to the Circuit Court of Appeals for the Fourth Circuit.

[November 5, 1934.]

Mr. Justice Cardozo delivered the opinion of the Court.

A question of limitation, similar to the one considered in our opinions in Nos. 37 and 39, and in Nos. 35 and 36, comes up for decision here.

The petitioner filed a return on May 28, 1918 under the Revenue Act of 1917 for the fiscal year ending March 31, 1918. The Revenue Act of 1918 (40 Stat. 1057) became a law on February 24, 1919, with retroactive provisions as of January 1, 1918. Thereafter the petitioner filed an additional return in accordance with Treasury Decision 2797 (approved March 11, 1919 and quoted in our opinion in Nos. 37 to 39), showing an additional tax of $50,638.75. The Act of 1918 provides (§ 250d) that except in the case of fraud, "the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made." A deficiency assessment was imposed in May, 1921, which is admitted to have been timely, and another on May 26, 1926, which is contested as too late. At that time written waivers were in existence, adequate in form, which extended the date for assessment and collection until December 31, 1926. The taxpayer asserts that they were procured by misrepresentation and signed without authority, and must therefore be ignored.

In an action to recover the tax paid by the petitioner under the 1926 assessment, the District Court held (1) that irrespective of any waiver the term of limitation ran from the date of the additional return, and (2) that the waivers were valid and binding. 3 F. Supp. 508. On the authority of decisions in the Ninth Cir-

cuit (*Zellerbach Paper Co.* and *National Paper Products Co.* v. *Commissioner,* 69 F. (2d) 852, 857), the Court of Appeals for the Fourth Circuit affirmed ruling No. 1 and did not pass upon the correctness of ruling No. 2.

For the reasons stated in our opinions in Nos. 37 to 39, and in Nos. 35 and 36, the first ruling is erroneous. The second ruling we do not consider, the question of the validity of the waivers being still open for determination in the court below.

The decree should be reversed, and the cause remanded to the Court of Appeals for the Fourth Circuit for further proceedings in accordance with this opinion.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.